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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,
Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Portland Web Pressmen's Union, Local No. 17, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 19, 1960.

OPINIONS BELOW

The opinion of the court below (Appendix B, *infra*, pp. 22b-34b) is not yet officially reported. It is unofficially reported in 47 L.R.R.M. 2432. The opinion

of the district court (Appendix A, *infra*, pp. 1a-2a) is reported in 188 F. Supp. 859.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, p. 36c) was entered on December 19, 1960. The petition for rehearing duly filed by petitioner was denied on January 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. In an action under Section 301 (a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for arbitration of any grievance involving the construction or violation of the collective bargaining agreement, may the court properly deny arbitration on the ground that the case presents no justiciable issue because the court has determined that the grievance sought to be arbitrated is not one for which an arbitrator could afford specific relief of a substantial character.

2. Whether the availability of a remedy under the National Labor Relations Act for the conduct which constitutes a breach of contract, deprives the court of jurisdiction to compel arbitration of the breach of contract.

STATUTES INVOLVED

Section 301 (a) of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. 185) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are as follows:

"SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a)."

STATEMENT

On March 5, 1958, the Portland Web Pressmen's Union, Local No. 17, hereinafter sometimes called the Pressmen, entered into a collective bargaining contract with the Oregonian Publishing Company and the Journal Publishing Company, hereinafter sometimes called the Publishers (Tr. 14-35).[1] This con-

[1] The references "(Tr.)" are to the Transcript of Record printed in the court below. Ten copies thereof have been filed with the Clerk of this Court.

tract by its terms was effective January 1, 1958, and was to continue until December 31, 1959, and from year to year thereafter unless within 90 days prior to December 31st in any year subsequent to 1958, one of the parties gave notice of desired changes therein (Tr. 5, 14-35). The contract provided a Joint Standing Committee to which the parties agreed to refer "all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof" (Tr. 16-17). The contract also provided (Tr. 17):

> "The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract."

In the event the Joint Standing Committee could not agree, there was provision for decision by a local board of arbitration (Tr. 17-18).

On or about October 28, 1959, each of the Publishers gave written notice to the Pressmen of its desire to negotiate a new agreement to supplant the theretofore existing contract between the parties and proposed to the Pressmen in writing certain specific changes which each of them desired to have incorporated in such new agreement (Tr. 6).

On or about November 10, 1959, members of Stereotypers Local Union No. 48, hereinafter sometimes called Stereotypers, commenced a strike against the Publishers and established picket lines at the plants of the Publishers, which picket lines have been continuously maintained at all times since then up to the time of the filing of the complaint in this case in the court below (Tr. 6). This strike was called by the Stereotypers to secure improved hours, wages and

working conditions to supplant those provided in an expired contract between the Stereotypers and the Publishers (Tr. 6-7).

The Pressmen on and at all times after November 10, 1959 and until January 2, 1960, advised its members of its and their obligations not to strike and not to engage in work stoppages while the contract between the Pressmen and the Publishers remained in effect (Tr. 7). The individual members of the Pressmen who were employed in the pressrooms of the Publishers obeyed this advice and did not strike or engage in any work stoppage, but as individuals each one declined to cross the picket lines maintained by the Stereotypers and declined to report for or to perform his work in the production of the Publisher's newspaper behind the picket line (Tr. 7). This failure of the individual members of the Pressman to cross the Stereotypers' picket lines or to report for work behind those picket lines continued from about November 10, 1959 until January 2, 1960 (Tr. 7).

On November 18, 1959, the Pressmen's negotiating committee met with executives of the Publishers and discussed the proposals of the respective parties for the new agreement between the Pressmen and the Publishers (Tr. 7-8). No conclusions were reached but the meeting terminated with an agreeable understanding that further meetings would be held upon call of the Publishers (Tr. 8).

The Pressmen made various unsuccessful informal efforts by telephone to arrange further meetings to negotiate a new agreement and on December 27, 1959, addressed a formal written request to the Publishers for a series of immediate meetings, calling attention to the fact that the existing agreement between the

Pressmen and the Publishers would expire on December 31, 1959 (Tr. 8, 36-37).

A reply to this request was received late in the afternoon of December 28, 1959, in which the Publishers stated that the Pressmen and its members on November 10, 1959, and thereafter had refused to honor the no-strike pledge of the then existing agreement between the Pressmen and the Publishers, that the pressmen who had failed to appear for work subsequent to November 10, 1959, "are no longer employees" and that the Publishers were ready to meet to negotiate a new contract at any time that the Pressmen could establish that it represented "a majority of our employees in an appropriate unit" (Tr. 8, 38-39). At no time prior to the receipt of this letter on December 28, 1959, had the Publishers ever in any manner challenged the employee status of the members of the Pressmen who had been employed in the pressrooms of the Publishers or the status of the Pressmen as exclusive bargaining representative of the pressroom employees of the Publishers (Tr. 8-9). Nor had the Publishers at any time from November 10, 1959, until the filing of the complaint in this case in the court below, initiated or participated in any of the procedures provided in the contract for the adjustment and settlement of contract disputes arising between the parties to the contract (Tr. 9).

The Pressmen, on December 28, 1959, immediately after receiving the aforementioned letter from the Publishers, sent the Publishers a Western Union night letter which was delivered not later than the morning of December 28, 1959, in which the Pressmen expressed its disagreement with the Publishers' position that the pressroom employees are no longer employees of the

Publishers, stated the Pressmen's view that if the Publishers had a grievance they should have resorted to the settlement procedures provided in the agreement, and itself referred to the Joint Standing Committee the differences between the parties arising out of the Publishers' letter of December 28, 1959 (Tr. 40). The Pressmen in its letter of December 28, 1959, requested a meeting of the Joint Standing Committee "on these emergency issues forthwith," urged that there was no occasion for either the Publishers or the Pressmen to take refuge in the "within five days" provision to delay such a meeting of the Joint Standing Committee beyond sometime on December 29, 1959 and stated that "our Standing Committee members stand ready to meet with the Publisher members of the same committee upon the shortest telephone notice" (Tr. 40-41).

The Publishers have never responded in any manner to this Western Union night letter (Tr. 9-10).

On January 4, 1960, the Pressman appointed members of the Joint Standing Committee, sent a letter to the Publisher appointees of the same committee asking to meet with them without further delay to deal with the differences referred to the Committee by the Pressmen's Western Union night letter of December 28, 1959 (Tr. 10, 41-43). The Pressmen's position with respect to the settling of these differences under the Joint Standing Committee procedures was stated in the letter of January 4, 1960, as follows (Tr. 43):

> "Those differences having arisen prior to January 1, 1960, and having been referred to the Joint Standing Committee prior to that date, the Union position is that the entire adjustment of differ-

ences procedures which are provided for in the basic agreement remain available and applicable to the parties, and obligatory upon them, until the differences have reached final determination through utilization and, if necessary, exhaustion of those procedures."

On January 11, 1960, the Publishers replied to the letter of January 4, 1960, stating that they did not agree with the positions taken by the Pressmen and therefore no useful purpose would be served by complying with the request (Tr. 10-11, 44).

On January 15, 1960, the Pressmen filed its complaint in the United States District Court for the District of Oregon, invoking the court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185) and seeking an injunction requiring the Publishers to follow the grievance procedures of the contract, including the arbitration provisions, with respect to the differences between the parties arising from the declination of the pressroom employees as individuals to cross the picket line of the Stereotypers (Tr. 3-14). The Publishers filed a motion to dismiss on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (Tr. 45).

The district court on April 14, 1960 handed down an opinion (Tr. 46-67) and on April 19, 1960 entered its order (Tr. 67-68) dismissing the complaint on the grounds urged in the motion to dismiss.

In its opinion the district court recognized that Section 301 of the Labor Management Relations Act "confers jurisdiction on the Federal courts to render a declaratory judgment as to an existing contract"

(Tr. 54-55) and "extends jurisdiction in a proper case to actions for specific performance of an arbitration agreement" (Tr. 55). The district court, however, held that it had no jurisdiction over the subject matter of the suit because the rights of the Pressmen, "if any, which might exist would arise by reason of the National Labor Relations Act and exclusive jurisdiction would be with the National Labor Relations Board" (Tr. 66).

The district court also held that the complaint failed to state a claim upon which relief could be granted because the complaint did not present facts showing a justiciable question (Tr. 66). The district court ruled that no vested rights had accrued before the contract expired (Tr. 56), that the period of time from the demand for processing of the grievance on December 28, 1959 until the contract expired on December 31, 1959 is so minimal that the doctrine of "*de minimis*" should be applied (Tr. 56) and that the Pressmen had in any event lost its right to compel arbitration because the failure of its members to cross the Stereotypers' picket line violated the no-strike clause in the contract (Tr. 56, 60-66). The district court held that its ruling that the Pressmen lost its right to arbitrate, rendered "moot" the legal question "of whether the arbitrator, under the language of the instant case should determine whether the issues in question were to be arbitrated" (Tr. 63).

On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (pp. 22b-35b, *infra*). The court of appeals held that no justiciable question was presented because the arbitrator would not have been able to afford specific relief (pp. 28b-30b, *infra*) and that

any rights which the Pressmen might claim would be within the exclusive jurisdiction of the National Labor Relations Board (pp. 30b-33b, *infra*). The court of appeals expressly declined to pass upon the contention of the Publishers "that the violation of the no-strike agreement by members of the Pressmen deprived the union of the right to invoke the arbitration clause of the contract" (pp. 34b-35b, *infra*).

REASONS FOR GRANTING THE WRIT

1. The court below failed to follow the principles announced by this Court in the cases of *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 547, 578; and *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596. In these cases this Court held that courts are not entitled to refuse to order arbitration because they regard the grievance in dispute as a "frivolous, patently baseless one" (363 U.S. at p. 566). In the *American Mfg. Co.* case this Court stated (363 U.S. at p. 568):

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

That the court below could not envision any specific remedy which an arbitrator could properly award in the instant grievance, should no more serve as the

basis for a refusal to enforce arbitration than the failure of a court to find a claim meritorious or not frivolous. There can be no difference in principle between courts denying arbitration because they see no possible remedy and denying arbitration because they see no possible merit. To refuse to compel arbitration for either reason is equally an improper refusal of the courts to defer to the arbitration process without introducing court made law where the parties had agreed to accept arbitrator made law. If a court can pass on the merits of the claim or its remediable nature as a condition precedent to enforcing arbitration, the parties are deprived of their contractual right to have this issue determined by the stipulated arbitration process rather than by the judicial process. It is the teaching of the three decisions of this Court in *American Mfg. Co.*, *Warrior & Gulf Co.*, and *Enterprise Corp.*, that courts must defer to the arbitration process without screening cases to see if they meet legal standards of merit before ordering arbitration. If the grievance is one that the parties have agreed to arbitrate, the courts must order arbitration.

Here the Publishers' contention made on December 28, 1959, that sometime between November 10, 1959, and December 28, 1959, the Pressmen had violated the no-strike clause and all the Pressmen's members ceased to be employees (Tr. 38), certainly presented a grievance within the language of the grievance clause of the then existing collective bargaining agreement, namely "all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof" (Tr. 17).

Since the grievance was one which the parties had contracted to refer to arbitration, the Pressmen was

entitled to specific performance of the agreement to arbitrate without any requirement on its part that it establish that there was specific relief which the arbitrator could award. The court below placed on the Pressmen the burden of satisfying the court that the arbitrator could award specific relief for this grievance. We believe that under the foregoing decisions of this Court this was an improper burden. Pressmen had secured the binding contractual obligation of the Publishers to let an arbitrator establish a remedy for grievances. The Pressmen was entitled to have the courts below enforce obedience to that contractual obligation without indulging in speculations as to the wholly technical and meaningless character of the only relief the courts can envision the arbitrator as awarding.

The Publishers must be held to their agreement to arbitrate. The Publishers can then argue to the arbitrator the proper limits of the award. The Pressmen is entitled to have the arbitrator decide whether any substantial remedy is properly to be awarded for its grievances.

The court below in viewing the grievance as one for which no arbitrator could award any specific relief took a judicial approach so at odds with the arbitral approach as to emphasize the correctness of this Court's view that parties who had bargained to have disputes decided by arbitrators were being deprived of what they bargained for if courts first screened grievances by judicial standards before enforcing arbitration. Turning to labor arbitration cases, we find no dearth of authority for the proposition that the arbitrator on the facts stated in the complaint could properly order full reinstatement to his respective job of

each member of the Pressmen. This right to be reinstated became a vested and accrued right in each individual employee when on December 28, 1959, the Publishers announced that none of the Pressmen's members was employed by them.

Labor arbitrators regularly protect employees from discharge for honoring a legitimate picket line. It is held to be an implied term of even a no-strike clause that honoring a picket line is a permissible employee activity which will not be penalized by the employer. For decisions so holding see *Encinal Terminals*, 4 LRRM 1117 (Wayne L. Morse, Arbitrator, 1939); *American Telephone & Telegraph Co.*, 6 L.A. 31, 35-36 (Saul Wallen, Arbitrator, 1947); *Waterfront Employers Assn.*, 8 L.A. 273, 278 (Clark Kerr, Arbitrator, 1947), reversed in part on other grounds 9 L.A. 5; *Shipscaler's Case*, quoted at length in 8 L.A. 273, 275-276 (Van C. Griffin, Arbitrator 1939).

Moreover, even where employees engage in an unauthorized or illegal strike, they do not automatically cease to be employees. *Mary Leila Cotton Mills, Inc.*, 26 L.A. 541 (Gerald A. Barrett, Arbitrator, 1956); *Alco Mfg. Co.*, 15 L.A. 715, 725 (Samuel H. Jaffee, Arbitrator, 1950); *Trans World Airlines*, 24 L.A. 95, 100 (Harold M. Gilden, Arbitrator, 1955). Where, as in the instant case (Tr. 30), the contract contemplates individual discharge notice to each employee and guarantees each employee discharged the right to receive written reasons for his discharge, which he may contest through the grievance procedure, a mass discharge is not permissible even for illegal strike action. *Trans World Airlines*, 24 L.A. 95, 100 (Harold M. Gilden, Arbitrator, 1955); *Mary Leila Cotton Mills, Inc.*, 26 A.L. 541, 543-544 (Gerald A. Barrett, Arbitrator, 1956).

Likewise, discharge is usually deemed too severe a penalty for contract violations involving improper failure to report to work due to observing a non-permissible picket line or participation in an unauthorized strike. *Cumberland Undergarment Co.*, 5 L.A. 766 (Copelof, Arbitrator, 1946); *Serrick Corp.*, 32 L.A. 994, 998 (Pearce Davis, Arbitrator, 1959); *Alo Mfg. Co.*, 15 L.A. 715, 725 (Samuel H. Jaffee, Arbitrator, 1950).

Where, as here, both the honoring of the picket line and the subsequent strike were legal, arbitrators regularly require the reinstatement of all strikers, with the same full seniority they would have had they continued at work throughout the period of the picket line and strike. *Wilson & Co.*, 34 L.A. 125 (United States District Judge Sam Perry, Neutral Arbitrator, 1960).

If the events entitling an employee to reinstatement took place during the term of a contract, it is immaterial that the arbitration takes place subsequent to the expiration of the contract. The right to reinstatement having accrued during the contract, its enforcement may take place after expiration of the contract. *Armour & Co.*, 11 L.A. 600, 604-605 (Harold M. Gilden, 1948); *Lane v. Endicott Johnson Corp.*, 11 L.A. 253, 299 N.Y. 725, 75 NYS 2d 171, 87 N.E. 2d 450 (1948). See also *United Steelworkers of America v. New Park Mining Co.*, 10th Cir., 1959, 273 F. 2d 352, where the court found the arbitration clause too indefinite for enforcement but held that the court itself could determine the validity of the discharges and order reinstatement although the contract had long since expired.

Similarly the Pressmen was entitled to a declaratory judgment from the arbitrator, finding that the Pressmen did not violate its no-strike obligations by failing to prevent its members from honoring the Stereotypers' picket line. Such a declaratory award would stand as a bar to a damage suit by the publishers or to claims in future judicial or administrative proceedings that Pressmen had so violated its contract.

Under no circumstances can it be said that the issues of violation of the no-strike clause and of non-employee status of the Pressmen's members, raised by the publishers' letter of December 28, 1959 (Tr. 38) were hypothetical or abstract. They were not hypothetical or abstract on December 28, 1959, when first asserted by the Publishers, and the mere expiration of the contract did not render them hypothetical or abstract. There is nothing else in the complaint which showed they were hypothetical or abstract.

2. The decision below is in conflict with decisions of the Third, Fourth, Fifth and Tenth Circuits in its holding that the federal courts do not have jurisdiction because the conduct alleged as a breach of contract also constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Board (pp. 30b-33b, *infra*).

In *Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 5th Cir., 1958, 257 F. 2d 467, 475, certiorari denied, 358 U.S. 880, the suit was brought by a union to compel arbitration of a grievance alleging that the discharge of strikers for misconduct during a strike violated the contract. One of the defenses was preemption by the National Labor Relations Board. The court rejected this defense and decreed

specific enforcement of the arbitration clause, stating:

> "The second ground of defense presents the question of whether parties to a collective bargaining agreement may contract to submit matters involving unfair labor practices to private arbitrators with such contract enforceable by the federal courts under section 301 of the Act, or whether all controversies concerning unfair labor practices are within the exclusive jurisdiction of the National Labor Relations Board which pre-empts the federal courts from acquiring jurisdiction over a contract violation which happens also to be an unfair labor practice. This question has not been raised previously in this Court, nor has it been decided by the Supreme Court.
>
> "The appellee asserts that since the discharges were made because of *union activity*—protected or unprotected—which presents the question of unfair labor practice vel non, and since the exclusive jurisdiction of the Board pre-empts state courts and agencies from deciding issues involving such unfair labor practices, certainly the parties cannot by contract give to private arbitrators more jurisdiction than is afforded to state courts. However, the Appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board.

"However, in this case, we must go one step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation and an unfair labor practice, a 'breach of contract is not an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decisions, the latter leaves decision discretionary. * * *" (Italics the Court's)

The same principle was enunciated and applied in *Independent Petroleum Workers v. Esso Standard Oil Co.*, 3rd Cir., 1956, 235 F. 2d 401; *Textile Workers v. Aristo Mills Co.*, 4th Cir., 1951, 193 F. 2d 529, 533-534; *United Steelworkers v. New Park Mining Co.*, 10th Cir., 1959, 273 F. 2d 352, 357-358.

The legislative history of the National Labor Relations Act establishes that the foregoing decisions of the Third, Fourth, Fifth and Tenth Circuit are correct. During the Congressional proceedings prior to enactment of the Labor Management Relations Act efforts were made to vest in the National Labor Relations Board jurisdiction over breaches of contract. Congress rejected these proposals. See House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 41-42 (1 Leg. His. LMRA pp. 545-546) which states:

"The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective

> bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

This Court should review the decision below in order to resolve this conflict among the circuits.

3. The issues presented are both of substantial public importance. This Court's decisions holding that courts are not to screen grievances for merit, will be rendered meaningless if courts may refuse to enforce arbitration on the ground that the grievance is not one for which any substantial remedy is available. And an even greater number of grievances will be denied arbitration if their unfair labor aspects place them beyond the jurisdiction of the courts. Almost any grievance can be viewed as presenting issues cognizable by the National Labor Relations Board either because the employee conduct was protected by the National Labor Relations Act or the employer conduct was motivated by anti-union animus or the employer failed to bargain collectively by not negotiating the issues fully and in good faith.

CONCLUSION

For the foregoing reas is respectfully urged that this Court should iss s writ of certiorari to review the decision below.

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